

A SERGEANT SALLEH ZAKARIA & ANOR v. DATUK RAMLEE MARAHABAN

HIGH COURT SABAH & SARAWAK, TAWAU
LIM HOCK LENG J

[CIVIL APPEAL NO: TWU-12ANCVC-2-1-2021]
4 JUNE 2021

CIVIL PROCEDURE: *Judgments and orders – Judgment in default – Application to set aside – Whether regularly obtained – Whether there was defence on merits – Whether service of process effected on defendants – Whether defendants at liberty to apply to set aside judgment in default – Rules of Court 2012, O. 13 rr. 2, 6, O. 19 rr. 3 & 7*

By encls. 10 and 11, against the first and second appellants ('defendants') respectively, the respondent ('plaintiff') sought leave to enter judgment pursuant to O. 13 rr. 2 and 6, and O. 19 rr. 3 and 7 of the Rules of Court 2012 ('ROC'). In both his affidavits in support, which did not include his MyKad number, and address, which were deposed to on 10 September 2019, the plaintiff averred that the writ and statement of claim was served on the defendants on 22 June 2019 at Bahagian Hal Ehwal Awam, Markus Angkatan Tugas Bersama 2, Pangkalan Operasi Hadapan (POH), Kem Kukusan 91000 Tawau ('Kem Kukusan'). The service of encls. 10 and 11 were said to have been effected at the Likas Square Post Office on 14 October 2019 by AR registered post addressed to the defendants at Kem Kukusan. After a lengthy exchange of affidavits and submissions, as well as an application by the defendants to strike out the plaintiff's reply affidavit, the Sessions Court Judge ('SCJ') entered judgment against both defendants in default of defence ('JID'). The defendants applied to set aside the JID, by encl. 70, but was disallowed and hence, this appeal. The plaintiff raised a preliminary objection that the defendants ought not to have applied to set aside the judgment or ought to have appealed against the Sessions Court Judge's ('SCJ') decision contending that it was not a JID.

Held (allowing appeal; setting aside JID):

(1) A JID can be set aside as of right, irrespective of merits, *ex debito justitiae*, if it was irregularly obtained or entered in non-compliance of the law, or there was non-service of the writ or the court lacked jurisdiction. Whereas, a JID regularly entered can be set aside if it can be shown that there is a defence on merits. An application to set aside or vary a JID must be made and served on the other party within 30 days 'after the receipt of the order or judgment by him.' A perusal of the intitulement of encls. 10 and 11 showed that they were filed pursuant to O. 13 rr. 2 and 6, both of which dealt with judgments in default of appearance; and O. 19 rr. 3 and 7, both of which dealt with judgment in default of defence. So, the defendants were at liberty to

apply to set aside the JID. They were not required to appeal against the SCJ's decision in entering judgment in default of defence. The plaintiff's preliminary objection was thus dismissed. (paras 7, 18 & 20)

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- (2) In a setting aside of JID application, all that needs to be shown is a defence on the merits in the defendants' affidavit(s). The defendants had generally denied the unparticularised allegations of the plaintiff, in respect of which any cause of action was, in any case, doubtful. The defendants' stand was that the action was essentially against the Government since the alleged wrongs were carried out in the course of their duties as army personnel, and that could not be said to be a sham defence. (para 22)

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- (3) There was no service of process because there was no mention of how and by whom the writ and statement of claim was served on the defendants on 22 June 2019 at Kem Kukusan. There was no evidence of the AR card with an endorsement or any proof of acknowledgment of receipt. The complete absence of evidence in the plaintiff's affidavits on how and by whom service of process was effected led to the irresistible conclusion that there was no service of process on the defendants. Hence, the JID was irregular and ought to be and was set aside. (paras 28-30)

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- (4) There was no reason for the defendants not to want to defend the action herein when the Attorney-General's Chambers ('AGC') was already defending the first defendant in a separate action derived from the same and related facts. Had the defendants filed their defence or asked for an extension to do so, they would have lost the right to challenge the purported service of process. In view of the non-service of process, the defendants were entitled to oppose the plaintiff's application to enter the JID. (paras 28, 29, 30)

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- (5) There was nothing pleaded to suggest that the defendants were acting in their personal capacity or on a frolic of their own. The action was, in substance, an action against the Government and by s. 26 of the Government Proceedings Act 1956, the cause papers ought to have been served on the AGC. The non-service of the writ and statement of claim or, even if service of process had been effected on the defendants personally, the impugned personal service, instead of service on the AGC, entitled the defendants to challenge receipt of process and the JID, as of right, irrespective of merits. In any event, the JID ought not to be left undisturbed for there was, in addition or in the alternative, a defence on merits. (paras 41-44)

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A Case(s) referred to:

- Evans v. Bartlam* (1937) AC 473 (*refd*)
Fira Development Sdn Bhd v. Goldwin Sdn Bhd [1989] 1 CLJ 1; [1989] 1 CLJ (Rep) 32 SC (*refd*)
Goh Teng Whoo & Anor v. Ample Objectives Sdn Bhd [2021] 4 CLJ 348 FC (*refd*)
Microsoft Corporation v. PC House (Imbi) Sdn Bhd [1998] 5 CLJ 474 HC (*refd*)
B *Mok Sai How v. Dakang Bikasan* [2017] 1 LNS 855 HC (*refd*)
Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Bhd & Anor [1996] 2 CLJ 586 FC (*refd*)
Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor [2002] 3 CLJ 213 FC (*refd*)
C *Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241 FC (*refd*)
Wallersteiner v. Moir [1974] 3 All ER 217 (*refd*)
White v. Weston (1968) 2 All ER 842 (*refd*)

Legislation referred to:

Government Proceedings Act 1956, ss. 14, 26
Rules of Court 2012, O. 13 rr. 2, 6, O. 19 rr. 3, 7, O. 42 r. 13

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Other source(s) referred to:

Malaysian Court Practice High Court, Vol I, p 537
For the appellants - Andi Razalijaya A Dadi; SFC & Mohd Ashraf Abd Hamid; FC
For the respondent - Marcel Jude M S Joseph; M/s Marcel Jude & Co

E *Reported by S Barathi*

JUDGMENT

Lim Hock Leng J:

- F** [1] Judgment in default (“the JID”) was entered for the respondent (“the plaintiff”) against the first and second appellants (who will collectively be referred to as “the defendants”) by the Sessions Court on 22 January 2021 with costs of RM5,000.
- [2] The parties will be referred to as they were in the Sessions Court.
- G** [3] By encl. 70, the defendants applied to set aside the JID but this was disallowed with costs of RM400.
- [4] Hence their appeal to the High Court. This court allowed their appeal on 8 April 2021. The plaintiff has appealed to the Court of Appeal.
- H** [5] These are the reasons for allowing the appeal, thus setting aside the JID. The defendants were ordered to file their defence within 14 days hence.
- Law Applicable To An Application For The Setting Aside Of A JID**
- I** [6] I will start with a summary of the principles which are pertinent in applications for the setting aside of JIDs. It is well-established that a JID can be set aside in two ways.

[7] A JID can be set aside if it was irregularly obtained or entered, for instance, if it was in non-compliance of the law, or there was non-service of the writ or the court lacked jurisdiction. In such an instance, the defendant will be entitled to set it aside as of right, irrespective of merits, *ex debito justitiae* (see *Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad* [1996] 1 CLJ 241), and will be entitled to costs (see *Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Berhad & Anor* [1996] 2 CLJ 586; [1996] 1 MLJ 374, where Edgar Joseph Jr FCJ cited with approval the reasoning of Russell LJ in *White v. Weston* (1968) 2 All ER 842, 846). These features distinguish an irregular JID from a JID regularly entered which can still be set aside if it can be shown that there is a defence on merits (see *Fira Development Sdn Bhd v. Goldwin Sdn Bhd* [1989] 1 CLJ 1; [1989] 1 CLJ (Rep) 32). All that said, subsequent to these apex court decisions, an application to set aside or vary a JID must now be made and served on the other party within 30 days “after the receipt of the order or judgment by him.” See O. 42 r. 13, Rules of Court 2012.

Plaintiff’s Preliminary Objection

[8] Before dealing with the defendants’ appeal, I need to consider the plaintiff’s preliminary objection which requires a short timeline of events to be set out.

[9] By encl. 10 (as against the first defendant) and encl. 11 (as against the second defendant), the plaintiff sought leave to enter judgment pursuant to O. 13 rr. 2 and 6, and O. 19 rr. 3 and 7, of the Rules of Court 2012.

[10] In both his affidavits in support (which did not include his MyKad number, and address) which were deposed to on 10 September 2019, the plaintiff averred that the writ and statement of claim was served on the defendants on 22 June 2019 at Bahagian Hal Ehwal Awam, Markus Angkatan Tugas Bersama 2, Pangkalan Operasi Hadapan (POH), Kem Kukusan 91000 Tawau (hereinafter referred to as “Kem Kukusan” in short).

[11] Subsequent thereto, the plaintiff’s counsel himself affirmed two affidavits of service in respect of the sealed notice of application and affidavit in support. The service of encls. 10 and 11 were said to have been effected at the Likas Square post office on 14 October 2019 by AR registered post addressed to the defendants at Kem Kukusan. A copy of the postal receipt was in each case annexed as exh. MJ-1.

[12] It is important, for reasons which will soon be apparent, that there was:

- (i) purported service of the writ of summons and statement of claim on 22 June 2019 with the affidavits by the plaintiff on 10 September 2019 referring to service of process; and later,

- A (ii) purported service of the sealed encls. 10 and 11 by post on 14 October 2019 for leave to enter judgment against the defendants, with the affidavits of service affirmed by the plaintiff's counsel.
- [13] After a lengthy exchange of affidavits and submissions, as well as an application by the defendants to strike out the plaintiff's reply affidavit, the
- B learned Sessions Court Judge ("the SCJ") entered judgment against both defendants in default of defence on 20 November 2020.
- [14] On 27 November 2020, the defendants applied to set aside the JID *vide* encl. 70 which was dismissed with costs on 22 January 2021.
- C [15] Hence the defendants' appeal before this court.
- [16] The plaintiff's preliminary objection is that the defendants ought not to have applied to set aside the judgment but rather, at that time, ought to have appealed against the SCJ's decision. The plaintiff contended that it was not a JID.
- D [17] That is not correct.
- [18] A perusal of the intitlement of encls. 10 and 11 will show, as mentioned earlier, that they were filed pursuant to O. 13 r. 2 and O. 13 r. 6 (both of which deal with judgments in default of appearance); and also
- E O. 19 r. 3 and O. 19 r. 7 (both of which deal with judgment in default of defence).
- [19] As if to make it clearer, the plaintiff states in the body of the notice of application that it is asking for leave to enter judgment against the respective defendants for failing to file and serve their memorandum of appearance and also the defence. While there are no notes of proceedings
- F ("NOP") for 20 November 2020 in the record of appeal, the SCJ in the NOP for 22 January 2021 states: "Earlier this court had granted the plaintiff's application to enter judgment in default of defence"
- G [20] So there can be no doubt that we are dealing with a JID here in respect of which the defendants were at liberty to apply to set aside the JID *vide* encl. 70. They were not required to appeal against the SCJ's decision in entering judgment in default of defence then. The plaintiff's preliminary objection is thus dismissed. The subsequent, present appeal against the SCJ's dismissal of encl. 70 is thus properly before the High Court.
- H **JID Irregularly Obtained: Non-Service Of Process**
- [21] Instead, I find that the JID was irregularly obtained by the plaintiff. The purported service cannot be maintained or upheld. If there was non-service of process, the premise upon which the SCJ entered JID in default of defence would be wrong in law for the defence need not be served if the writ of summons and statement of claim was not served.
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[22] Even if that were not the case, in a setting aside of JID application, there is no requirement that a draft defence be exhibited and all that needs to be shown is that there is a defence on the merits in the defendants' affidavit(s) (see *Mok Sai How v. Dakang Bikasan* [2017] 1 LNS 855: "the plaintiff submitted there was no draft defence annexed to the defendant's affidavit. It is trite that such is not required, all that is required is to state what the defendant's defence is in the affidavit. This plaintiff's objection is without basis"). It is noted the defendants had generally denied the unparticularised allegations of the plaintiff, in respect of which any cause of action is, in any case, doubtful. Further/alternatively, it is clear the defendants' stand is that the action was essentially an action against the Government since the alleged wrongs were carried out in the course of their duties as army personnel, and that cannot be said to be a sham defence. See *Evans v. Bartlam* (1937) AC 473.

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[23] Returning to the main point of non-service, I find there was no service of process because if we look at the plaintiff's personal affidavits in support (even if the defective omissions of his MyKad number and address were to be ignored, as they must be since the defendants did not object) in the record of appeal, vol. 1, pp. 26-27 and 28-29, there is no mention of how and by whom the writ and statement of claim was served on the defendants on 22 June 2019 at Kem Kukusan. Reproduced here is para. 3 of the plaintiff's affidavit concerning the first defendant (which is similar to the affidavit concerning the second defendant):

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On 22nd day of June, the Writ of Summons and statement of claim dated 14th day of May, 2019 was served on the abovenamed first defendant at Bahagian Hal Ehwal Awam, Markus Angkatan Tugas Bersama 2, Pangkalan Operasi Hadapan (POH), Kem Kukusan 91000 Tawau, Sabah.

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[24] The defendants averred on affidavit that (a) Kem Kukusan was never their registered or last known address and on the day the service of process was alleged to have been effected, 22 June 2019, they were at Kompeni Bantuan, Batalion Ke-8, Rejimen Renjer Diraja Para, 76200 Kem Terendak, Melaka; and (b) they never received the writ of summons and statement of claim either personally or by AR registered post. See encls. 25 and 26, the affidavits in opposition.

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[25] To avoid confusion, the affidavits of service deposed to by the plaintiff's counsel are a separate matter. They were in relation to the posting by AR registered post of the notice of application for leave to enter JID, not service of the writ and statement of claim. See ROA, pp. 30-37.

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[26] Had the writ and statement of claim been served by AR registered post (or by registered post), there was no evidence of the AR card with an endorsement or any proof of acknowledgment of receipt: see the recent Federal Court decision in *Goh Teng Whoo & Anor v. Ample Objectives Sdn Bhd* [2021] 4 CLJ 348.

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- A [27] The complete absence of evidence in the plaintiff's affidavits of 10 September 2019 (on how and by whom service of process was effected on the defendants) leads to the irresistible conclusion that there was no service of process on the defendants. Hence the JID was irregular and ought to be and was set aside. The appeal was accordingly allowed with costs of RM10,000. The defendants were ordered to file and serve their defence within 14 days from 8 April 2021.

- B [28] Though the defendants entered appearance on 31 October 2019, having found out about the action herein through the learned SFC (*vide* encl. 19 filed on 29 October 2019) who was defending the first defendant in a related suit BKI-23NCVC-2-4-2019), the entry of appearance is not considered a positive step in the proceedings, ever since the distinction between conditional and unconditional appearance under the Rules of the High Court 1980 was swept away by the Rules of Court 2012. Even under the previous regime, the Rules of the High Court 1980, the Federal Court held that the entry of an unconditional memorandum was not tantamount to a step in proceedings which prejudiced the defendant's right to apply for a stay - or similarly, one could say, the right to object to a JID. Before leaving this point, there was no reason for the defendants not to want to defend the action herein when the Attorney-General's Chambers was already defending the first defendant in a separate action derived from the same and related facts.

- E [29] Had the defendants here filed their defence or asked for an extension to do so, they would lose the right to challenge the purported service of process. See *Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor* [2002] 3 CLJ 213 where Mokhtar Abdullah FCJ held: "If the applicant has taken his first step in the proceedings by entering an appearance, that step is a permissible step that is not considered to be a step in the proceedings that would bar an application for stay. However, if the applicant has subsequently delivered any pleadings, or taken any other step in the proceedings which indicates his election to allow the action to proceed in the court, the applicant will be considered to have abandoned his right to seek recourse to arbitration and would be barred from applying for a stay of the proceedings."

- G [30] In view of the non-service of process, the defendants were entitled to oppose the plaintiff's application to enter judgment in default. Had the Sessions Court found that there was non-service, as it ought to have, the plaintiff would then have to serve the writ and statement on the defendants.

- H [31] In passing, it may be said that upon service of process being disputed, the plaintiff or defendants could have agreed to disregard or discount the purported service of the writ and statement of claim, and to have the cause papers properly served, thus avoiding the protracted exchange of affidavits
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and submissions, and much judicial time being expended. Be that as it may, encls. 10 and 11 filed by the plaintiff were wrong in that he applied to enter JID pursuant to both default of appearance and defence, though eventually the SCJ entered JID of defence.

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[32] In any event, JID ought not to have been entered since the statement of claim does not disclose any cause of action against the defendants with damages to be assessed.

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The Plaintiff's Pleadings Disclose No Cause of Action

[33] The plaintiff was the Assemblyman for Semporna from 2008 to 2018, and is further described in his statement of claim as a well-known politician and corporate figure who had received an award for the undertaking and completion of construction projects to the value of RM1 billion.

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[34] According to the plaintiff's pleaded case, on 11 April 2019, he had taken a boat trip with his son and nephews for fishing business purposes and had proceeded to Matakang Island when it was intercepted by a patrol boat by the Royal Malaysian Army with soldiers led by the first defendant who took "endless photographs" in a manner that was "derogatory (*sic*), embarrassing and humiliating." A body search was carried out on the plaintiff by the first defendant and his men. The plaintiff was not asked "who they were and what they were doing," and "the first defendant and his men were concerned about the (fire) arms of the plaintiff found on the vessel but no clarification on this matter was properly sought" though the plaintiff had informed the relevant authorities of his itinerary in advance. The humiliation was allegedly meted out without regard to human rights. The plaintiff and his group were then asked to proceed to Matakang Island by the first defendant and his men.

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[35] There, the second defendant took over, and was alleged to be "equally rude." The second defendant who had allegedly subjected the plaintiff and his group to further "unnecessary and humiliating treatment" then escorted them to Semporna where two officers from the police force and the Marine Department (dispatched by the OCPD) advised him "on the identity of the plaintiff and his standing in society." A "serious verbal and intense altercation took place between (the officers) and the second defendant." In the course of the altercation, the officers produced the plaintiff's identity card and his firearms licence. It was pleaded that the second defendant "realised he had made a serious mistake and error of judgment together with the first defendant ... concerning the status of the plaintiff." The defendants did not proceed to detain the plaintiff "and the said matter was closed there and then."

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[36] That was the first part of the statement of claim. Aside from the closure of the matter there and then as pleaded, there are no particulars for assault and battery, injuries or physical contact pleaded to entitle the plaintiff

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- A to an order for “damages for assault and battery” *vide* prayer (A). The serious verbal and intense altercation was between the police officers and the defendant as can be seen from the words pleaded. The altercation was not between the plaintiff and the defendants. In respect of prayer (B), damages for negligence, there was no duty of care or breach thereof pleaded. In respect of prayer (C), damages for breach of the plaintiff’s constitutional and human rights, no particulars were given nor any cause of action discernible. Neither is there any basis for exemplary damages *vide* prayer (D) pleaded. The rudeness, embarrassment and derogatory behaviour alleged on their own are not tantamount to a cause of action. As for prayer (E), learned counsel for the plaintiff apprised the court at the hearing of the appeal that the injunction to restrain the defendants from harassing “or injuring the reputation and good name of the plaintiff” was withdrawn.

- [37] Next, the plaintiff may say they have pleaded libel by para. 20 *et seq* regarding a press statement dated 15 April 2019 but it was pleaded that it “was issued by Angkatan Tugasan Bersama 2 (ATB 2)” which is not a defendant here. It was not, according to the plaintiff’s pleaded case, the publication of the first and second defendants. The alleged libel was not committed by the defendants.

- [38] As for the alleged release by the defendants of photographs of the plaintiff during the incident, the prayer for injunctive relief against them was withdrawn, so it was wrong in law to enter judgment in default when no relief for the cause of action exists.

- [39] In the alternative, it is in the plaintiff’s pleaded case that the first and second defendants hold the post of Sergeant and Major in the Royal Malaysian Army respectively, and “are members of the authority responsible for the military forces of Malaysia.” The plaintiff was ordered to proceed to Matakang Island “under the control and direction of the patrol boat of the first defendant and his men.” It was further pleaded that the plaintiff and his relatives “were brought under escort of the second defendant to Semporna”.

- [40] In their affidavits in opposition, the defendants invoked the Government Proceedings Act 1956, s. 14 of which provides that nothing done by a member of the armed forces while on duty “shall subject either him or the Government to liability in tort ... for causing personal injury to another person.” This would be of relevance so far as the suit is for “assault and battery,” although the plea is itself doubtful as no particulars were provided.

- [41] Looking at the action as a whole, there is nothing pleaded to suggest that the defendants were acting in their personal capacity or on a frolic of their own.

[42] In sum, the action was in substance, an action against the Government and this, by s. 26, the cause papers ought to have been served on Attorney-General's Chambers, more so as the SFC was already acting for the first defendant in a related suit, as mentioned earlier.

[43] On both counts, the non-service of the writ and statement of claim (paras. 21-29) or, even if service of process had been effected on the defendants personally, the impugned personal service instead of service on the Attorney-General's Chambers, would have entitled the defendants to challenge receipt of process and the JID, as of right, irrespective of merits.

[44] In any event, the JID ought not to be left undisturbed for there is, in addition or in the alternative, a defence on merits. As was held in *Microsoft Corporation v. PC House (Imbi) Sdn Bhd* [1998] 5 CLJ 474, where the plaintiff applied to enter judgment in default of defence, Steve Shim J (as he then was) held, "the court may in its discretion extend the time within which a defence may be filed and served provided no injustice is caused by so doing. The court will not enter a judgment which it would afterwards set aside on proper grounds being shown. A judge will exercise his discretion on the same lines as he will in setting aside a judgment in default: see Malaysian Court Practice High Court (Vol. I) at p. 537; *Wallersteiner v. Moir* [1974] 3 All ER 217 CA at p. 232."

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